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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 749 .

OVERSEAS TANKSHIP CORPORATION,

Petitioner,

—against—

GUY B. KEEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 5, 1952.

Opinion Below.

The opinion in the Court of Appeals for the Second Circuit has been reported in 194 F. 2nd 515 and appears at App. 37-45.*

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* All references are to pages. References to "Appendix for Petitioner" have "a" following page number as distinguished from references to "Appendix for Plaintiff-Appellant".

Jurisdiction.

Certiorari under Subdivision 1 of Section 1254, Title 28, United States Code, is appropriate because, although the order of the Court of Appeals is not a final judgment, it presents important questions of law and issues "fundamental to the further conduct of the case."

> *United States* v. *General Motors Corporation*, 323 U. S. 373, 377;
> *Land* v. *Dollar*, 330 U. S. 731, 734.

Support for this statement is to be found in the authorities cited in support of this petition.

Questions Presented.

1. Whether the owner's warranty of the seaworthiness of his vessel extends to members of the crew for the competency of their fellow crew members in the same manner as with respect to hull and gear.

2. Whether, under general maritime law, an owner's responsibility for the seaworthiness of his vessel includes responsibility to a member of the crew for injuries sustained when assaulted by a temperamentally unfit crew member in the absence of knowledge by the owner direct or imputable of such unfitness.

3. Is the owner of a vessel an insurer against an injury being inflicted by a temperamentally unfit crew member upon a fellow crew member?

4. Whether a statement of law by the trial judge outside the presence of the jury and held to be incorrect upon appeal constitutes reversible error where it is unaccompanied by any ruling or order of the trial court.

5. Whether the reversal of the judgment after an extended jury trial can be predicated solely upon a statement of law made by the trial judge during a colloquy between court and counsel outside the presence of the jury and unaccompanied by any specific ruling by the court or exception of counsel in the event an appellate court should later hold that such statement was an incorrect expression of the law.

Statement.

Respondent and John Mruczinski, were both members of the crew of the "Meuse Argonne," a tanker owned and operated by petitioner. The respondent signed on as an able-bodied seaman and Mruczinski as the second cook. While the ship was in Manila, P. I., Mruczinski and respondent went ashore on leave and came back to the vessel on the same launch. Mruczinski was drunk, and there is evidence that respondent was also drunk. The two got into a quarrel, either on the launch over respondent's supposed failure to pay Mruczinski a gambling debt, or over Mruczinski lighting a cigarette after they had boarded the ship. In the scuffle which followed, the respondent struck Mruczinski knocking him to the deck. Mruczinski picked himself up, went to the galley, got hold of a meat cleaver, and hit Keen on the head, causing a fractured skull (App. 38).

Suit was brought by respondent against petitioner, alleging liability on the theory either of petitioner's negligence or the unseaworthiness of its vessel.

Both theories were grounded upon the alleged vicious propensities of Mrucznski. At the trial the evidence on this issue was conflicting. Respondent went further and near the end of his case attempted, through a witness named Moore, to show that Mrucznski was actually insane (App. 98a-110a). In the course of his examination of Moore the trial judge excused the jury and a discussion followed between the judge and counsel as to rules of evidence relating to the proof of insanity (App. 110a-119a). At the conclusion of this colloquy the respondent's counsel argued that proof of the insanity of Mrucznski alone was sufficient to establish petitioner's liability (App. 118a-119a). The trial judge expressed his disagreement with this proposition and stated in effect that he did not regard petitioner as an insurer against injuries sustained by a member of the crew resulting from the vicious propensities of another member of the unlicensed personnel, and further that in a case of this nature he regarded the proof in an action for indemnity under the maritime law to be the same as for negligence under the Jones Act (46 U. S. C. § 688). No ruling upon the evidence and no order of any kind by the trial judge was made as a result of this statement, no exception was taken thereto and the examination of the witness Moore continued (App. 119a *et seq.*).

After an extended trial lasting eleven trial days the case was submitted to the jury which returned a verdict for petitioner. The respondent appealed to

the Court of Appeals which reversed and directed a new trial. The reversal of the judgment was based *exclusively* upon the one statement of the trial judge to which reference has just been made (App. 43-44). The Court of Appeals contended that the trial "judge had made it entirely clear that he did not think that Mruczinski's temperamental unfitness for his duty was a ground of liability unless it came to the defendant's knowledge". It held this to be an incorrect expression of the law and that the correct principle was one of liability without fault. It held that the responsibility of the owner to members of the crew for assaults by unlicensed members of the crew was precisely the same as responsibility with respect to injuries from defective hull and appliances, and that, therefore, if a jury were to find that Mruczinski was temperamentally unfit for his duties liability would follow irrespective of the owner's knowledge direct or imputable of such unfitness.

The court recognized that other Circuits had expressed a different rule and that in no previous decision had liability been imposed in the absence of the owner's knowledge, direct or imputable, of the seaman's temperamental unfitness, but justified the result on the ground that the owner could carry insurance, the premiums for which would ultimately be paid by shippers (App. 42-43).

In its opinion the Court of Appeals adverts at length to that portion of the trial judge's charge to the jury to the effect that the shipowner was under no duty to inquire or examine into, nor was it an insurer of, the mental or physical condition of a prospective employee; that the presence among crew members of a seaman of violent, vicious pro-

pensities would constitute a menace to his fellow seamen, and that if the fact of his temperament was known to his officers or should have been known to them they were obliged to use reasonable care to remove the peril (App. 15). The Court of Appeals held this to be an incorrect statement of the law and stated that had the respondent excepted thereto it would not have hesitated to reverse the judgment on that ground but that it could not do so since the "respondent was content with the charge" (App. 43). The court then apparently searched the record to find a possible basis for reversal elsewhere and seized upon the expression of the trial judge during the course of the colloquy referred to above, disregarding the fact that it was made outside the presence of the jury, was unconnected with any ruling and when later repeated in the charge was accepted by the respondent (App. 44).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that petitioner was liable for an assault upon respondent by a fellow crew member in the course of a private quarrel upon a mere showing that the assailant was a person of vicious propensities or otherwise temperamentally unfit for duty and without the necessity of establishing that petitioner knew or had reason to know of such propensities or unfitness.

2. In holding that an isolated statement of law by the trial judge in the course of an extended jury trial constituted reversible error when made during a col-

loquy between court and counsel outside the presence of the jury and unaccompanied by any ruling or order of the court or exception of counsel.

3. In reversing the judgment of the District Court.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in the instant case is directly in conflict with the decision of the Circuit Court for the Fifth Circuit in *The E. B. Ward, Jr.*, 20 Fed. Rep. 702. In that case a seaman was denied recovery for injuries which he sustained through the negligence of his fellow employees. After announcing the common law rule that the master is not liable to his servant for the negligence of a fellow servant, the court went on to deny recovery on the basis of general maritime law and in that connection stated the law to be as follows:

> "* * * Nor does the master warrant the competency of any of his servants to the others. * * * In the admiralty, no more than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others, all alike engaged in the common employment of navigating the ship. * * *"

The holding in that case was followed by the District Court for the Southern District of Alabama in *The Lizzie Frank*, 31 Fed. Rep. 477. In that case, Judge Toulmin stated:

> "Seaworthiness includes a competent crew. Yet the owner does not warrant to each seaman the competency of the others. *The E. B. Ward*, 20 Fed. Rep. 704; *Dixon* v. *The Cyrus*, 2 Pet. Adm. 411."

This conflict was conceded by the court below when it stated, in its opinion (App. 42):

> "It is true that in two early cases Judges certainly did use language which is counter to what we are holding."

Actually more than a difference in language was involved, since in both cited cases recovery was denied on the basis of the law as quoted.

The holding of the Second Circuit is also in conflict with the statement of the law on this subject by the Ninth Circuit in *The Rolph,* 299 Fed. Rep. 52, 55:

> "From these and many other decisions in which the Courts have discussed the duty of the shipowner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage where the mate is a man *known* to be of a most brutal and inhuman nature; one *known* to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors." (Italics supplied.)

The decision of the Ninth Circuit in *The Rolph* case cannot be read other than as holding that knowledge by the shipowner, direct or imputable, of the vicious propensities of the mate was an essential ingredient of liability. It is, moreover, a far cry from imposing liability for an assault by a mate with a long record of brutal, violent, and inhuman treatment of seamen, as in *The Rolph* case, to the imposition of liability for an assault by one crew member upon another in the course of a private quarrel while both were more or less under the influence of alcohol and without any showing that

the owner knew or had any reason to know that one of the parties to the quarrel was a person of vicious propensities or otherwise temperamentally unfit for duty.

Finally, the instant case appears to be in conflict with relatively recent decisions in the same Circuit. In *Kable* v. *United States*, 169 F. 2d 90, the Second Circuit in affirming the dismissal of a libel based upon an assault upon a chief officer by a chief engineer of the vessel distinguished earlier decisions dealing with liability for unseaworthiness, including *The Rolph* case, *supra,* by stating (p. 92):

> "* * * For in those cases the evidence convincingly established that the person committing the assault for which the shipowner was ultimately held liable had *known* vicious propensities. Quite the contrary is the situation before us." (Italics supplied.)

See also:

> *Brailas* v. *Shepard SS Co.,* 152 F. 2d 849, 850, cert. denied 327 U. S. 807.

The Bench and Bar had accepted the authorities cited above as firmly establishing the rule that liability could be imposed only where prior knowledge, direct or imputable, existed of the vicious propensities of the assailant. The instant case departs from that principle and is contrary to the decisions in the Fifth and Ninth Circuits as well as repudiating the previous decisions in the Second Circuit.

While the Court of Appeals does not admit this much it does recognize that it has extended the doc-

trine of seaworthiness to a point beyond any previous application of the principle. Thus it states in its opinion (App. 41):

> "It must be owned that we have not found any decision which deliberately decided that an owner is responsible for the seaworthiness of his ship in respect of personnel in the same sense that he is in respect of hull and gear; and, strictly, the point is *res integra.*"

2. The question presented is of great importance in the administration of the general maritime law. By making the owner an insurer of the physical, mental and temperamental character of each member of the crew, not only in their relations to the public, but in their relations to each other, the court widely extends the liability of steamship owners, insurers, shippers, stevedoring companies and ultimately the general public.

The decision has profound judicial, economic and social implications. For the first time the owner is held liable for injuries sustained during private quarrels between members of the crew which it was impossible to prevent or avoid.

Liability is imposed for signing on one who was temperamentally unfit although his "appearance does not betray his disposition." A new type of workmen's compensation has been judicially created:

> "But suppose there will be many such instances; that is no reason why an individual seaman who has suffered because his fellow is not up to his work, must bear the loss. Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the

premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships" (App. 43).

This far-reaching and revolutionary principle, ostensibly based on the rule of unseaworthiness, in fact charters a new course in the law of seamen. Even granting that Congress in writing the Jones Act (46 U. S. C. § 688) did not intend to pre-empt the entire field of employer's liability to seamen, it could hardly have intended that the courts would extend to seamen rights transcending those based upon fault by enlarging the maritime doctrine of seaworthiness.

In the final analysis, this is precisely what the Court of Appeals has done; it has enunciated a new doctrine of liability without fault. It is respectfully submitted that such a drastic extension of the doctrine of seaworthiness in the face of the Jones Act is properly a matter of legislation and not judicial determination. Judicial dissatisfaction with the limitations of Jones Act negligence is hardly justification for creation of new liabilities extending far beyond the expressed Congressional policy.

Compare:

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277, 280, 96 L. Ed. 217.

The Court of Appeals necessarily concedes that the owner has no way to protect himself except by insurance. Mere investigation and care in the selection of employees no matter how painstaking would be ineffective assuming the widest latitude of the em-

ployer to pick and choose. It is obvious that powerful labor organizations representing the prospective employee would resist any selection made on a basis as tenuous as temperamental unfitness. The rejection of a seaman of doubtful or questionable competence would mean that no other steamship owner could safely hire him. No labor organization would permit such blacklisting. The inappropriateness of stretching the doctrine with respect to defects in hull and gear to personnel is thus exposed. The owner has always complete freedom to discard the doubtful hull or appliance. Human beings are not and should not be susceptible to similar disposition.

It is respectfully submitted that this Court should not permit the rule announced in this case to become ingrained in the law but should review it at the earliest moment and permit it to stand or repudiate it only upon a full review of all the relevant considerations.

3. The reversal of the judgment rests entirely upon an alleged incorrect statement of law by the trial judge to counsel in the course of a colloquy between court and counsel outside the presence of the jury and unaccompanied by any ruling, order or action adverse to respondent. As such, the statement of law, even if in error, was harmless. The reversal, therefore, disregards the admonition of Rule 61 of the Federal Rules of Civil Procedure and the fundamental principle that, to constitute reversible error, there must be substantial prejudice.

Dimmitt v. *Breakey* (C. C. A. 5), 267 Fed. Rep. 792, 794, cert. denied 254 U. S. 641;
McComb v. *McCormack* (C. C. A. 5), 159 Fed. 2d 219, 227.

It is not contended that the statement did not relate to an important consideration in the case. However, there is no basis whatever for assuming that respondent suffered any substantial prejudice from the mere fact that the statement was made. Respondent continued with his examination of the witness as theretofore. He was accorded full latitude to establish the insanity of Mruczinski by competent evidence. Under the circumstances, the statement of the trial judge was even more innocuous than the harmless error contemplated in Rule 61. That rule presupposes either the admission or exclusion of evidence or some ruling or order or thing done or omitted to be done by the trial court. Nothing of that sort occurred in the instant case.

The integrity of a jury verdict after an extended trial is not to be destroyed by what amounts to nothing more than an isolated expression of the law later found to be incorrect. The respondent cannot be heard to complain. The real harm, if any, occurred when the trial judge, in its charge to the jury, repeated, in substance, that which the Court of Appeals struck down as error when made in the colloquy. The respondent, in the words of the Court of Appeals, "was content with the charge" and did not except thereto. Had he done so, the Court of Appeals states that it would not have hesitated to reverse on the charge. The Court accomplished the same result, however, by searching the record to find in the colloquy what it held to be a similar incorrect statement of the law, without any attempt to show that a substantial right of the respondent was affected by the making of such statement.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MORGAN J. BURKE, JR.,
DORSEY, BURKE & KEBER,
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May 2, 1952.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY FOGLER,
Counsel for Respondent.

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POINT I. By statute appeals to the Supreme Court from a Circuit Court of Appeals can be only from final judgments or decrees. It is well settled that an order granting a new trial does not dispose of the case but leaves it open to the party to retry his case, and such an order is not appealable..... 1

POINT II. A. Petitioner is misleading this Court when it states that the issue of insanity was raised but by one small isolated ruling. The opening address of the plaintiff to the jury which devoted a substantial part to the insanity of Mruczinski put the petitioner and the Court on notice as to plaintiff's claim for indemnity based on Mruczinski's insanity and the proof of insanity to be offered.

The Court specifically ruled shortly after the trial was begun in answer to an exception taken by plaintiff that thereafter exceptions need not be taken to adverse rulings.

During the trial when the Court suppressed evidence bearing on Mruczinski's insanity and in effect overruled what it had previously ruled in plaintiff's opening address, it was fully aware that the rulings were adverse to plaintiff's principal contention in the case..... 6

POINT II. B. Petitioner by misleading the Court of Appeals that no exception was taken to the erroneous portion of the charge, succeeded in having this read into the opinion. Petitioner now seeks to mislead this Court when it knew that portion of the charge was taken bodily from petitioner's request No. 2 to charge and that the Trial Court granted a specific exception and even made sure that the exception was reserved after the charge..... 9

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POINT III. A. It would be unfair to the seaman to permit this case to be reviewed at this time where Judge Hand with a unanimous Court ruled that because of rules of evidence peculiar to the law of the State of New York, the trial judge had made erroneous rulings in failing to admit records bearing on Mruczinski's insanity 10

POINT III. B. Certiorari would be unfair at this time without a retrial of all the issues because it was not known until after the trial that the reason why the entire steward's department was incompetent according to the overwhelming evidence in behalf of the defendant was because the defendant was interested only in getting about 40 of the American surplus tankers which it had placed under the Panamanian flag across to the Orient where the Americans were replaced by Chinese who brought high octane gasoline and oil to the Communists (Exhibit A) 13

POINT IV. The opinion is in line with the law expressed in the Second Circuit as well as the Third and Ninth Circuits. There is no conflict. In fact is closely follows the recent *Spellman* case of the Third Circuit Court of Appeals.

To ascribe to Judge Learned Hand, Chief Judge Swan, and Judge Augustus Hand who have made the most substantial contributions to the admiralty law, an intent to overrule that eminent court's own decisions without a forthright statement to that effect is merely unthinkable. The opinion written with customary thoroughness and erudition delves into every authority.

A. To show unseaworthiness due to an incompetent captain in line with the *Spellman* case in the third circuit, and unseaworthiness due to incompetency of the entire steward's department in line with the ninth circuit, we call attention to Point II-B and Point II-C of our Brief in the Court of Appeals, as follows:..... 16

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B. On defendant's own testimony and indeed the basis of its defense that the assault aboard ship arose out of gambling aboard ship, the vessel was unseaworthy because the proof showed that the captain was not competent since he permitted full scale gambling to continue, and enforced no discipline, and when advised that Mruczinski had taken a gun and put it into a crew member's ribs shortly before the assault on the plaintiff he did not even investigate the facts surrounding the gun incident 16

(a) No qualifications of the Captain were shown other than that this was the first white crew that he had since 1943..... 17

(b) He specifically admitted that the only crew that he had handled were Indians and Chinese whom he preferred..... 17

(c) Although there is some question as to the exact time when he heard the rumor that Mruczinski had put a gun into Smith's ribs a fair reading of the deposition disclosed that it must have been prior to the time of the assault upon Keen..... 17

C. Aside from plaintiff's overwhelming evidence even on defendant's own testimony the unseaworthiness due to an incompetent steward's department was fully established. The testimony by deposition of the steward, the master, and Mruczinski established that not a single, solitary member of the steward's department was competent 18

(a) Steward testified that the two messmen and the utility men were inexperienced..... 18

(b) The Captain had testified that he recalled that the messman and the utility man wanted to get off the ship in England because of the Steward and it could have been because of the Steward and Mruczinski..... 19

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(c) Mruczinski, the second cook, stated that the reason he made the trip was to get some experience so that he could get into the Union 19

(d) According to Mruczinski, messman Smith with whom he had a fight didn't give the men good service. This fight was right near the Captain and the Steward stopped it. It was then stated that the Captain and the Steward stopped the fight..... 19

(e) The testimony of Mruczinski was that he had to do the work of chief cook Donald Smith who was drunk..... 19

(f) As to Mruczinski, suffice it to say that the entire record shows his incompetency and certainly the act of splitting a man's head open with a meat cleaver speaks for itself.... 19

(g) We add nothing to the obvious incompetence of defendant's representatives who after the assault put plaintiff and Mruczinski in the same room together and put them aboard the same plane to travel some 7,000 miles together..... 19

POINT IV. D. To show that the opinion is in accord with the previous opinions of the Second Circuit, we refer the Court to Point I-D of our Brief in the Court of Appeals.

"Aside from the reasons advanced as to an inquiry into the sanity of Mruczinski as a witness the trial court erred in ruling that 'the sanity of Mruczinski was not under inquiry in this lawsuit.'

As a matter of law a seaman who is insane aboard a tanker transporting high octane gasoline is a source of peril to those who sail with him rendering the vessel unseaworthy.

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Where the seaman is a second cook and the overwhelming weight of testimony shows that he was taken from jail by the port captain in Texas City at the time of the explosion, and that he was filthy at the time, and that during the entire time on the voyage to Manila, consuming some four months, he wore the same dirty shirt, pair of unmatched socks, shoes with one shoelace; talked about insanity in his family, never combed his hair or shaved, even slept in the one dirty set of clothes, never washed; did not do his work; was drunk from the time he was taken out of said jail in Texas City a great deal of the time until the vessel arrived at Manila where he split open the plaintiff's head with the sharp end of a meat cleaver when he was thoroughly intoxicated; had a revolver and a knife under his pillow; had assaulted a fellow crew member in the steward's department; had threatened the chief cook with death; had threatened the third mate with death for no reason; and that most of the steward's department saw the consul and tried to get off the ship because of him, enough evidence was offered to warrant a full inquiry as to his sanity and it was therefore error to strike out testimony of crew members that he was crazy, and that he was out of his head, and to refuse to permit Dr. Ambler to testify as to his opinion of the man's sanity where the doctor had actually seen him.

The shipowner does not fulfill its duty to furnish a seaman with a seaworthy crew where it supplies him with an insane second cook..... 20-21

POINT V. To show that substantial justice would not be done by a review at this time and to avoid repetition we respectfully refer the Court to examination of the entire plaintiff's brief and reply brief in the Court of Appeals..... 22

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POINT VI. The basic point that Judge Learned Hand decided was eminently correct—as between the shipowner who puts an insane man aboard ship and the seaman who must take the men placed aboard and who has no way of anticipating an insane man's conduct, ordinary principles of negligence have no application.

A tanker transporting high octane gasoline with an insane member of the crew taken from jail in Texas City at the time of the Texas City explosion is unseaworthy as to the crew as well as to hull and gear. We wonder what the insurers would cry if Mruczinski admittedly taken from jail in Texas City at the time of the Texas City disaster, had caused the ship to be blown skyward because of his insanity?..... 24

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